United Nations CCPR/C/SR.2621

International Covenant on Civil and Political Rights

Distr.: General
27 April 2009

Original: English

Human Rights Committee

Ninety-fifth session

Summary record (partial)* of the 2621st meeting

Held at Headquarters, New York, on Tuesday, 31 March 2009, at 3 p.m.

Chairperson: Mr. Iwasawa

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* No summary record was prepared for the rest of the meeting.

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The discussion covered in the summary record began at 5 p.m.

Organizational and other matters (*continued*)

Working methods (*continued*) (CCPR/C/95/R.5)

1. **The Chairperson** drew attention to document CCPR/C/95/R.5, containing a proposal by Sir Nigel Rodley on undue delay in submitting communications. It consisted of a footnote to rule 96 (c) of the Committee's rules of procedure, which stated that the Committee should ascertain that a communication did not constitute an abuse of the right of submission. The footnote explained in what circumstances a communication would constitute an abuse of the right of submission.

2. **Mr. Thelin**, speaking on a point of order, said he had been informed that it was virtually impossible for anyone not already in the building or accredited to the Committee to attend the Committee's public meetings. He understood that there were security concerns, especially in the case of meetings in New York, but perhaps the Bureau could look into that issue and find a solution that would enable the general public to attend, which would help to make the Committee's meetings better known.

3. **Mr. O'Flaherty** said he shared Mr. Thelin's concerns, but that there were limitations on what the Committee was able to do. It did have a media strategy document, which included proposals such as webcasting and podcasting to raise awareness of the Committee's meetings. That might be the best way to pursue those concerns.

4. **Ms. Wedgwood** said that perhaps it would be sufficient to make the telephone number of the Committee's secretariat available to those who were interested in attending meetings. Perhaps members of the Committee secretariat would be allowed to escort visitors. It would be unfortunate, and surely a violation of the Committee's rules, if people were turned away.

5. **Ms. Prouvez** (Secretary of the Committee) said that the Committee was bound by the security rules that applied to all meetings held at Headquarters and that no special arrangement could be requested for the Human Rights Committee. All non-governmental organizations (NGOs) that had contacted the secretariat prior to the session expressing a wish to attend had been duly accredited so that they could obtain a badge allowing them to enter the building. According to the rules, visitors who would be attending for less than five days would receive a temporary visitors' badge and in that case a member of the secretariat had to escort them within the building.

6. **Mr. Amor**, speaking on a point of order, said that the Committee had already, at a previous session, begun to discuss a draft by Mr. Shearer on the issue of undue delay in the submission of communications. He did not think that it had been formally withdrawn and although he did not necessarily agree with the text, it was important to respect the Committee's usual procedures, and also the work that had been done. The Committee should have formally withdrawn the previous draft before asking someone else to prepare another text.

7. **The Chairperson** explained that Committee members had received a copy of Mr. Shearer's draft and it had been discussed. At the request of the Committee, the Bureau had discussed the draft at its meeting on 26 March. It had recommended that Mr. Shearer's proposed new draft rule 96 (g) should be considered again in a plenary meeting and that Sir Nigel Rodley should make a new proposal.

8. **Mr. Amor** asked whether Mr. Shearer's draft had been formally withdrawn. He could not support a procedure that ignored the rules.

9. **Mr. Thelin** said he understood from the Chairperson's clarification that the Committee was considering Mr. Shearer's text as well as Sir Nigel Rodley's. The choice was to make a clear change in the rules, as in the text put forward by Mr. Shearer, or to add a footnote to rule 96 (c). He preferred the more direct route of changing the rule, as the addition of a footnote could be ambiguous.

10. The Committee needed to take more robust action in relation to late submissions. According to Mr. Shearer's proposal, the limits would be four years following exhaustion of domestic remedies and two years following termination of an international procedure. For his own part, he would be inclined to reduce those limits to three years for domestic remedies and just one year for an international procedure, as there would always be the safety valve of exceptional circumstances, such as distance, cultural problems or other difficulties. The Committee had a serious backlog of work to deal with, and one option

would be to refuse to consider communications that had been submitted with undue delay.

11. **Mr. O'Flaherty** said that his recollection was that the Committee had had an exhaustive discussion of Mr. Shearer's draft. At the end of the debate, Mr. Shearer had concluded that his proposal lacked adequate support; the debate on his paper could therefore be regarded as having been concluded.

12. He understood that the paper to be introduced by Sir Nigel would help the Committee to move forward while respecting procedures and building on the earlier debate. The general discussion should not be reopened, as members would then be repeating opinions that they had already expressed. Although the Committee's membership changed over time, it was still the same Committee, and must continue to build on past efforts.

13. **Sir Nigel Rodley** said that the Bureau had asked him to prepare a text in the light of the failure of the previous draft to win sufficient support. Unfortunately, the previous text had led to an entrenchment of the opinions of those who did or did not want restrictions to apply to late submissions. He had tried to find a way of avoiding a strict rule while putting an end to the constant case-by-case discussion of whether there had been an abuse of the right of submission. At present, a delay of up to 10 years was rarely questioned, which was not very helpful. He wished to see some restriction, but in a flexible and non-arbitrary manner.

14. The original proposal had added a rule of procedure that made no reference to abuse of the right of submission. Yet the Committee had no power to add a *ratione temporis* rule as the Covenant itself did not have one. Rule 96 (c) referred to abuse of the right of submission, but it did not seem appropriate to define in the body of the text what constituted abuse, as there might be other grounds which should not be excluded. Furthermore, if the Committee wished to have flexible and non-arbitrary criteria, the rule would become much longer than its current form. That was why he had proposed a footnote that would not interrupt the flow of the text.

15. Rather than establishing firm rules, the footnote started by stating the general principle that delay in submission was not in principle a basis for a decision of inadmissibility *ratione temporis*. It went on to explain that in exceptional circumstances a delay in submission could amount to abuse of the right of submission and then listed some of the factors that would be taken into account.

16. Subparagraph (a) was rather cumbersome and might need rewording. It was intended to cover instances such as the first case which had been rejected as an abuse of the right of submission (*Gobin v. Mauritius*), in which an individual who claimed that he had been discriminated against in an election did not make his submission until the following election took place, so that the State party had no opportunity to offer effective redress. Other factors considered were the availability of legal representation, knowledge of or access to the Committee and the lack of a convincing explanation.

17. Whether or not it was appropriate to add a footnote to rule 96 (c), he did feel that the general principle expressed in the chapeau of his proposed text was appropriate. The Committee could decide which factors should be taken into account in giving effect to that principle.

18. **Mr. O'Flaherty** said, while he believed that Sir Nigel had proceeded correctly, he would suggest deleting the first sentence and having the chapeau of the text begin with the word "Under" in the second sentence. Also, in order to cover all eventualities, he would, in subparagraph (d), insert the words "has or" before the words "has not"; and in subparagraph (e), replace the words "has no other" by the words "has or has not any other". He also proposed adding a new subparagraph (f), reading: "The State party has or has not invoked the time delay in its own submissions to the Committee". The jurisprudential reference for that last suggestion would be his own and Mr. Bhagwati's dissent in the case of Gordon Brown v. Namibia.

19. **Mr. Rivas Posada**, endorsed Sir Nigel's text and agreed that the Committee could not make an actual rule about unreasonable delay because the Optional Protocol made no provision for inadmissibility *ratione temporis*. He would like to be absolutely sure, however, that an undue delay constituted the only possible abuse of the right of submission. If there were other grounds they too should be spelled out in the text itself in order to define the full scope of abuse.

20. **Mr. Amor**, concurring with Mr. Rivas Posada, recalled the divisive debates that the Committee had had on the question of late submissions in the past, and insisted that the Committee's position was not yet set. He believed that Mr. Shearer's text had the advantages

of brevity, clarity and incorporation into rule 96 itself without setting arbitrary limits, as opposed to Sir Nigel's long text in a footnote to the rule, setting specific time periods and creating new problems by introducing the notions of reasonableness, lack of opposition by the State and excessive delay. He preferred the former approach.

21. **Ms. Wedgwood** noted that a further problem caused by undue delay in submission was that it could complicate a State party's fact-finding function and its ability to provide a real remedy.

22. She believed the Committee did have the power to set reasonable rules on the issue of time limits, as it did on others. In past Committee discussions, she herself had been a latitudinarian with regard to length of time, and generosity on time limits was helpful particularly in areas of the world that did not have their own regional human rights bodies and where people might not be aware of the available remedy of submitting communications to the Committee. The Committee was taking too technical a view of the right of submission. It would be more useful to consider how it could try to solicit and obtain communications from individuals in countries other than the small group of countries traditionally involved, and also how it could solicit the kind of communications with the broadest possible jurisprudential impact, affecting more than the legal system of a particular country.

23. **Ms. Keller**, commending Sir Nigel for an excellent draft that she considered a good basis for discussion, proposed that it be made clear in the chapeau that the subsequent subparagraphs were not an exhaustive enumeration.

24. **Mr. Fathalla**, endorsing Sir Nigel's text, observed that subparagraph (a) shifted the burden of proof to the State party while subparagraphs (b) and (c) set out clean-cut circumstances limited by date; subparagraphs (d) and especially (e) left the issue open by implying that if the author could justify an excessive delay, the submission might be admissible.

25. **Mr. Amor** urged caution in making a distinction between authors who had had the assistance of a lawyer and those who had not (subparas. (b) and (c)), because it might encourage misrepresentation by the author of a submission if it became known that the Committee was sensitive to the lack of legal representation as an extenuating factor. Furthermore, he found at least 12 questionable terms in the text that needed discussion.

26. **Mr. Salvioli**, supporting Sir Nigel's text, said that he himself was not sure if an unreasonable delay was the only possible abuse of the right of submission. The travaux préparatoires for neither the Covenant nor the Optional Protocol were of assistance in the matter of abuse of the right of submission. The Committee could opt for a clear statement of acceptable time limits within which communications could be submitted, or it could seek to enumerate all possible circumstances under which it would have to reach an admissibility decision in each individual case. He himself was not sure which way to proceed.

27. He agreed with Mr. O'Flaherty's proposal to delete the first sentence, but would be against adding his new subparagraph (f). If the State party did invoke non-exhaustion of domestic remedies, it could do so only as a preliminary objection to admissibility; and if the State party did not invoke it, it was not incumbent upon the Committee to look into it.

28. **Sir Nigel Rodley**, speaking on a point of order, asked for an opportunity to reply to the various remarks, some of which, however, did not bear further discussion in the Committee. The list of factors was certainly non-exclusive, and that could be made clear by replacing the word "Factors" in the third sentence of the chapeau by the words "Among the factors" and substituting the words "would be" for the word "include".

29. On a broader issue, undue delay was indeed only one aspect of abuse of the right of submission: but it was the only aspect on which thus far the Committee had ever had case law. It was up to the Committee to decide if it wanted to deal with that one abuse or to consider all other possible abuses as well. It would also have to decide if it wanted a free-standing rule of procedure regarding *ratione temporis* inadmissibility, as part of an inherent power to rule. Yet there too, the same factors listed would apply.

30. It would not be difficult to conclude the debate provided that there was a will to do so. The Committee must, at any rate, proceed on the understanding that Mr. Shearer himself had discovered — that his text — which he personally would have been happy to endorse — did not provide a basis for agreement.

31. **Mr. Amor** requested distribution of the summary record of the last meeting at which the Committee had discussed the matter.

The meeting rose at 6.05 p.m.